

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**THE REPUBLIC OF IRAQ, including as
PARENS PATRIAE on behalf of the
CITIZENS of the REPUBLIC OF IRAQ,**

Plaintiff,

- against -

ABB AG et al.,

Defendants.

08-CV-05951 (SHS)

ECF CASE

ORAL ARGUMENT REQUESTED

**DEFENDANTS' REPLY TO IRAQ'S RESPONSE TO DEFENDANTS'
NOTICE OF SUPPLEMENTAL AUTHORITY**

DEFENDANTS JOINING IN REPLY

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| ABB AG | Flowserve B.V. |
| ABB Electric Sanayi AS | Flowserve Corporation |
| ABB France SAS (successor in interest to ABB Automation SAS and to ABB Industrie Champagne by way of its merger into ABB Automation SAS) | Flowserve Pompes S.A.S. |
| ABB Industrie AC Machines (now ABB Industrie AG/ABB Schweitz AG) | Glaxo Wellcome Export Ltd. |
| ABB Near East Trading Limited | Glaxo Wellcome SA (South Africa) (PRY) Ltd. |
| ABB Solyvent-Ventec | GlaxoSmithKline Egypt SAE |
| ABG Allgemeine Baumaschinen Gesellschaft MbH | GlaxoSmithKline Walls House |
| Aesculap AG and KG | Ingersoll-Rand Italiana S.p.A. |
| Aesculap Motrics S.A. | Ingersoll-Rand World Trade Ltd. |
| Aesculap Surgical Instruments SDN BHD | Intervet International B.V. |
| AGCO Danmark A/S (erroneously named as AGCO Denmark A/S) | Janssen Pharmaceutical |
| AGCO S.A. | Kia Motors Corporation (erroneously named as "Kia Motors") |
| Air Liquide Engineering | Liebherr Export AG |
| Akzo Nobel N.V. | Liebherr France, SA |
| Astra Zeneca AB | Merial SAS |
| Atlas Copco Airpower N.V. | N.V. Organon |
| Atlas Copco CMT Sweden AB | Novo Nordisk A/S |
| AWB Limited | OSRAM Middle East FZE |
| B. Braun Medical Industries SDN BHD | Railtech International SA |
| B. Braun Medical S.A.S. | Renault Agriculture & Sonalika International |
| B. Braun Melsungen A.G. | Renault Trucks SAS (f/k/a Renault V.I.) |
| BNP Paribas Hong Kong | Roche Diagnostics GmbH |
| BNP Paribas London Branch | Rohm and Haas France, S.A. |
| BNP Paribas Paris | Secalt S.A. |
| BNP Paribas (Suisse) SA | Serono Pharma International |
| BNP Paribas UK Holdings Limited | Siemens S.A.S. France (erroneously named as Siemens S.A.A. of France) |
| BNP Paribas USA | Siemens Sanayi ve Ticaret A.Ş. (erroneously named as Siemens Sanayi ve Ticaret A.S. of Turkey) |
| Buhler Ltd. | SmithKline Beecham International |
| CG Holdings Belgium N.V. (f/k/a Pauwels International N.V.) | Solar Turbines Europe, S.A. |
| Chevron Corporation | Sulzer Pumpen Deutschland, GMBH |
| CILAG AG International | Sulzer Turbo Ltd. |
| Clyde Union, S.A.S. (f/k/a/ Union Pumps, S.A.S.) | Textron, Inc. |
| Daewoo International Corp | The Weir Group PLC |
| David B. Chalmers, Jr. | Thermo King Ireland Ltd. |
| David Brown Transmissions France, S.A.S | Valtra do Brasil Ltda. (erroneously named as Valtra do Brazil) |
| Doosan Benelux SA, as successor to Ingersoll-Rand Benelux, N.V. | Vitol, S.A. |
| Dow AgroSciences LLC | Volvo Construction Equipment AB (as successor to Volvo Construction Equipment International) |
| Dow AgroSciences S.A.S. | Woodhouse International, LLC |
| Eli Lilly Export SA | York Airconditioning & Refrigeration FZE |
| Evapco Europe S.R.L. | |
| F. Hoffmann-La Roche Ltd | |

Defendants respectfully submit this reply to Iraq's Response to Defendants' Notice of Supplemental Authority ("Supp. Resp."). A reply brief is warranted because Iraq's analysis of *Morrison v. National Australia Bank Ltd.*, No. 08-1191, is wrong.¹ *Morrison*'s application is not, as Iraq suggests, narrowly limited to the Securities Exchange Act. Supp. Resp. at 3. To the contrary, *Morrison* reiterated a much broader, "longstanding principle of American law": "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, slip op. at 5-6 (June 24, 2010).

Iraq nevertheless insists that the *Morrison* presumption is rebutted here because RICO contains the phrase "interstate or foreign commerce." Supp. Resp. at 3-4. But that type of phrase is precisely what *Morrison* meant by holding that a "general reference to foreign commerce" is insufficient to "defeat the presumption against extraterritoriality." See slip op. at 13-14; see also *id.* at 13 ("[W]e have repeatedly held that even statutes . . . that expressly refer to '*foreign* commerce' do not apply abroad." (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) (emphasis in original))). Moreover, that phrase has nothing to do with the scope of the conduct that RICO prohibits — it merely modifies the term "enterprise" to make clear that Congress was legislating within its power under the Commerce Clause. This description of the enterprises in question cannot be extrapolated to imply a general application to all extraterritorial conduct. As *Morrison* itself reiterates, when a statute makes some reference to foreign commerce, "the presumption against extraterritoriality operates to limit that provision to its terms." Slip. op. at 13. Finally, *Morrison* instructs that courts must interpret extraterritoriality in

¹ Iraq begins by dredging up arguments unaffected by *Morrison* — whether or not Defendants' alleged conduct was extraterritorial. See Supp. Resp. at 1-2. That issue has already been argued at length. See Memo. in Supp. of Defs.' Mot. to Dismiss at 55-61; Pl.'s Opp. to Defs.' Mot. to Dismiss at 53-54.

light of the statute's "focus," *see Morrison*, slip op. at 17, and RICO, of course, is not focused on barring all "enterprises." RICO's focus is on preventing racketeering.

Indeed, the courts that have searched the text of RICO for signs of extraterritorial application have uniformly held that "[l]ike the Securities Exchange Act, the RICO statute is silent as to its extraterritorial application." *See Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991).² *Morrison*'s rule is therefore simple: "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, slip op. at 5-6. Iraq simply ignores this body of RICO case law, instead quoting *dictum* from a pre-*Morrison* case involving an entirely different statute. Supp. Resp. at 1, 4-5 (citing *Pasquantino v. United States*, 544 U.S. 349 (2005)). Iraq would have *Pasquantino* stand for the proposition that the phrase "interstate or foreign commerce" in the wire fraud statute evidences a legislative intent to have the statute apply extraterritorially. *Pasquantino*, however, expressly stated that its "interpretation of the wire fraud statute **does not** give it 'extraterritorial effect'" and explained that all of the wrongful conduct alleged in that case was domestic. 544 U.S. at 371 (emphasis added). Iraq relies on *dictum* that the phrase "interstate or foreign commerce" indicates that Congress did not have "only domestic concerns in mind" when it enacted the wire fraud statute. *Id.* at 371-72 (internal quotations omitted). *Dictum* from a case interpreting an entirely different statute says nothing about RICO's extraterritorial reach, especially given the extensive case law establishing that "the RICO statute is silent as to its extraterritorial application." *See Alfadda*, 935 F.2d at 479. Thus, when examined in context, *Pasquantino* does not hold, as Iraq erroneously contends, that any statute containing the phrase "interstate or foreign commerce" was intended by Congress to be

² *See also Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) ("RICO itself is silent as to its extraterritorial application."); *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("The RICO statute is silent as to any extraterritorial application.").

applied extraterritorially, and does not indicate that RICO was intended to reach extraterritorially.

Finally, Iraq points to some provisions of the Money Laundering Control Act, 18 U.S.C. § 1956(a)(2), and the Travel Act, 18 U.S.C. § 1952, which are listed in RICO's definition of "racketeering activity." Supp. Resp. at 5. But dozens of statutes are included in that definition, *see* 18 U.S.C. § 1961(1), and the vast majority are entirely domestic in nature. Moreover, even the few statutes that have some extraterritorial reach, like the Money Laundering Control Act, only apply extraterritorially "in certain limited circumstances." *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314, 316 (S.D.N.Y. 2009) (Money Laundering Control Act did not apply to extraterritorial conduct of a Swiss branch of a British bank). That some statutes (among many) in the definition of "racketeering activity" have a "certain limited" extraterritorial reach cannot support Iraq's categorical argument that it is "obvious" Congress intended RICO itself to apply extraterritorially. *See* Supp. Resp. at 5. Indeed, the federal securities laws, too, include some provisions that reach foreign registrants, *see, e.g.*, Securities Exchange Act of 1934 § 12(g), 48 Stat. 881 (1934), but *Morrison* nonetheless held that the statutory term at issue lacked a sufficient indication that the securities laws were intended to apply extraterritorially. Had Congress intended to provide a "clear indication of an extraterritorial application" for RICO, *see Morrison* slip op. at 6, it could have enacted such language. It did not.

Respectfully submitted,

Dated: August 10, 2010

/s/ Brant W. Bishop, P.C.

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*And, by permission, on behalf of all joining
Defendants*

CERTIFICATE OF SERVICE

I, Brant W. Bishop, P.C., hereby certify that I caused a true and correct copy of the foregoing DEFENDANTS' REPLY TO IRAQ'S RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY to be served via ECF upon all counsel of record registered through the Court's ECF system.

On this 10th day of August, 2010.

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